Supreme Court, U. S.
FILED
AUG 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974
No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., and EDGINGTON OIL COMPANY,

Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondents, Copp Paving Company, Inc., Copp Equipment Company, Inc., and Ernest A. Copp.

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Opinions Below.

The opinion of the court of appeals (No. 72-2152) is reported at 487 F.2d 202 (1963).

The opinion of the district court is reported at 1972 Trade Cases, Par. 74,013, and is set out as Appendix "A" to this brief.[1]

[1]The appendix to this brief is hereinafter referred to as "BP APP A," with page number. The single appendix will be referred to simply as "APP." Petitioners' brief is referred to as "PET BR," with page number. The record is referred to as "R," with page number.

Jurisdiction.

The jurisdictional requisites are adequately set forth in petitioners' brief.

Questions Presented.

Interstate highways are part of the federal system of highways identified in Title 23, United States Code, Section 101, *et seq.*, and construction, maintenance, and repair thereof is authorized, regulated, and substantially financed by the United States. Two manufacturing procedures are required to produce asphaltic concrete which is used in the construction, maintenance, and repair of interstate highways. The first is the production of liquid asphalt which is one of the end products of refining crude oil which comes, substantially, from foreign and interstate sources. Liquid asphalt is commonly shipped across state lines.

The second procedure is the production of asphaltic concrete which is produced in a "hot plant" where the liquid asphalt and sand and gravel are combined into the finished product. Hot plant owners are customarily highway paving contractors who used asphaltic concrete in the construction, maintenance, and repair of interstate highways or sell asphaltic concrete for the same use.

Three of the petitioners refine and distribute liquid asphalt. Another of the petitioners distributes liquid asphalt and manufactures asphaltic concrete at fifty-five hot plants in California, Arizona, and Nevada, and uses asphaltic concrete, and sells that product for use, in the construction, maintenance, and repair of interstate highways. A fifth defendant below, whose rights will be directly affected by the decision herein, also manufactures asphaltic concrete at eleven hot plants

in Southern California and uses asphaltic concrete in the construction, maintenance, and repair of interstate highways. Respondents own a hot plant, manufacture and sell asphaltic concrete and use asphaltic concrete in the construction, maintenance, and repair of interstate highways, all in competition with petitioners. Respondents sued petitioners (and the fifth defendant) claiming violations of Sections 1 and 2 of the Sherman Act, Sections 3 and 7 of the Clayton Act and Section 13(a) of the Clayton Act, the 1936 amendment to that statute commonly known as the Robinson-Patman Act.

The district court held that it lacked jurisdiction under any of these statutes because asphaltic concrete was locally manufactured and locally applied. The court below reversed, holding that there was jurisdiction as respects alleged violations of each of these statutes upon the grounds that interstate highways are, classically, "instrumentalities of interstate commerce" and that interstate highway builders and contractors and suppliers and their sales of asphaltic concrete for that purpose, are "in commerce" because of the close relationship with such interstate commerce instrumentality. This Court denied the petition for certiorari addressed to jurisdiction under Sections 1 and 2 of the Sherman Act, but granted the petition as to the jurisdictional questions as respects the other three statutes.

The questions presented as to these remaining statutes therefore are as follows:

1. Is the jurisdictional requirement of Section 7 that the acquired corporation be a corporation "also engaged in commerce" satisfied as a matter of law when that acquired corporation:

(a) manufactures asphaltic concrete at eleven Southern California hot plants from asphalt refined and produced substantially from interstate and foreign crude oil;

(b) sells such asphaltic concrete for use, and uses, that product in the construction, repair and maintenance of interstate highways authorized, regulated and substantially financed by the United States.

2. Are the jurisdictional requirements of Section 3 of the Clayton Act that the seller, charged with unlawful tie-in practices, be a person "engaged in commerce" and that the prohibited practices are carried out "in the course of such commerce", satisfied as a matter of law where that seller:

(a) manufacturers asphaltic concrete at fifty-five hot plants located in Arizona, California and Nevada from liquid asphalt produced from substantial quantities of foreign and interstate oil, sells for use and uses asphaltic concrete for the construction, maintenance and repair of interstate highways authorized, regulated and substantially financed by the United States;

(b) engages in the prohibited tie-in practices in the course of selling asphaltic concrete for such interstate highway uses.

3. Are the jurisdictional requirements of Section 2(a) of the Clayton Act, as amended, commonly known and hereinafter referred to as the Robinson-Patman Act, that the seller is "engaged in commerce" and that the prohibited discriminatory sales are "in the course of," and "in," such commerce, satisfied where that seller:

(a) manufactures asphaltic concrete at fifty-five hot plants located in California, Arizona and Nevada from liquid asphalt refined from substantial quantities of foreign and interstate oil, sells for use, and itself uses, asphaltic concrete for the construction, maintenance and repair of interstate highways authorized, regulated and substantially financed by the United States;

(b) engages in the prohibited discrimination in sales of asphaltic concrete for such interstate highway use.

Constitutional Provisions and Statutes Involved.

Constitution, Article I, Section 8, Clause 3:

"The Congress shall have power * * * to regulate Commerce with Foreign Nations and among the several States * * *"

Sherman Act, Act of July 2, 1890, c. 647, §§ 1, 2:

"(1) Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."

"(2) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 730, as amended:

Section 1 (15 U.S.C. § 12):

"* * * 'Commerce', as used herein, means trade or commerce among the several States and with foreign nations * * * *."

Section 3 (15 U.S.C. § 14):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities * * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 4 (15 U.S.C. § 15):

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fees."

Section 7 (15 U.S.C. § 18):

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * * of any other corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. * * * *"

Section 2(a) (15 U.S.C. § 13(a)) Act June 19, 1936 adding Sections 13(a), 13(b) and 21(a) of Title 15 and amending Section 2 of the Clayton Act, commonly known as the Robinson-Patman Anti-Discrimination Act, c. 592, 49 Stat. 1526 (15 U.S.C. § 13, subd. (a)):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce * * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. * * * *"

Title 28, U.S.C. § 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Statement of the Case.

A. Basic Facts.

The respondents are Copp Paving Company, Inc., Copp Equipment Company, Inc., and Ernest A. Copp (hereinafter "COPP"). Copp operates a hot plant where it manufactures asphaltic concrete from hot liquid asphalt, aggregates and fillers. Copp sold asphaltic concrete to third parties (so-called "commercial sales") and also employed asphaltic concrete to construct, maintain and repair interstate highways.[2]

Petitioners Gulf Oil Company ("GULF"), Union Oil Company of California ("UNION") and Edgington Oil Company ("EDGINGTON") (hereinafter sometimes referred to as "the oil companies") purchased crude petroleum from foreign, interstate and local sources and operated refineries from which, among other things, liquid asphalt was produced.

(a) Gulf sold all of its liquid asphalt to petitioner, Industrial Asphalt, Inc. ("INDUSTRIAL"), Gulf's subsidiary, for further distribution in the form of liquid asphalt or for conversion by Industrial into asphaltic concrete. App. 105.

(b) Union sold its liquid asphalt to third parties in the western states, and it also supplied some of the liquid asphalt requirements of Sully-Miller Contracting Co. ("SULLY-MILLER"), Union's subsidiary, for conversion into asphaltic concrete. App. 99.

(c) Edgington sold its liquid asphalt in California and Nevada. In southern California it sold to Copp, Industrial and Sully-Miller among others. App. 86, 124-141.

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[2]Interstate highways are part of the federal system highways described in 23 U.S.C.A. § 101, *et seq.*

Petitioner, Industrial, purchased all of Gulf's supply of liquid asphalt, and together with supplies of liquid asphalt acquired from other suppliers, both inside and outside of California, distributed that liquid asphalt, in part, in a number of western states including California. Industrial also owned and operated fifty-five hot plants in California, Arizona and Nevada where it manufactured and sold asphaltic concrete to third parties in competition with Copp and others, and also employed asphaltic concrete in the construction, maintenance and repair of interstate highways, in competition with Copp and others. Gulf acquired all of the capital stock of Industrial. App. 105.

Sully-Miller, a wholly-owned corporate subsidiary of Union, purchased liquid asphalt from Union and from others, with the balance of Union's supply of liquid asphalt being distributed in the western states. Sully-Miller operates eleven hot plants in Southern California; manufactures asphaltic concrete either sold or used for constructing, maintaining, and repairing interstate highways. Union acquired all of the capital stock of Sully-Miller.[3] App. 181-182.

Both liquid asphalt and asphaltic concrete are used in connection with the construction, maintenance, surfacing, resurfacing, repairing, grading and paving of interstate roads and highways. It was also conceded below that the liquid asphalt market was an interstate market. However, petitioners contended that because asphaltic concrete, by its very nature, cannot be transported long distances for application to roads and highways, that fact conclusively established the asphaltic

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[3]Sully-Miller is not a petitioner here although this court's disposition of the case will directly affect it.

concrete market as a local market not subject to Section 1 or 2 of the Sherman Act, Section 3 or 7 of the Clayton Act, or the Robinson-Patman amendment to the Clayton Act.

B. Proceedings in the District Court.

Copp's complaint in the district court alleged, in essence, that the petitioners, and others, entered into a combination and conspiracy to restrain and monopolize the sale of liquid asphalt, the sale of asphaltic concrete, and the business of asphaltic paving of highways and roads, including particularly interstate and federal system highways, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2), and that pursuant thereto, petitioners (and Sully-Miller) had ob- paving business in Southern California. (App. 55-58; Br. App. 6.) Copp alleged, under oath that the elements of this combination and conspiracy included, among other things, the following:

(a) The fixing of prices at which hot asphalt oil would be sold;

(b) The allocation of supplies of petroleum and petroleum products, including hot asphalt;

(c) The fixing of prices for the sale of asphaltic concrete;

(d) The acquiring of ownership and control of a substantial number of hot plants, including more than sixty percent (60%) of all of the hot plants operated in Southern California and in Los Angeles and Orange Counties;

(e) The allocation of customers as respects hot asphalt oil and asphaltic concrete;

(f) Threatening Copp's customers to cut off supply of asphaltic concrete in areas where Copp did not operate;

(g) Buying off and coercing Copp's customers not to do business with Copp;

(h) Tying the sale of other commodities so as to induce and require asphaltic concrete purchasers not to purchase from Copp in violation of Section 3 of the Clayton Act, 15 U.S.C. § 14;

(i) Selling hot asphalt oil and asphaltic concrete in such a manner as to discriminate in price between purchasers of such commodities of like grade and quality in violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13;

(j) Selling asphaltic concrete at unreasonably low prices and at below cost in the area where Copp competed and subsidizing those unreasonably low prices by artificially maintaining prices in other areas in which Copp did not compete;

(k) That Gulf acquired all of the capital stock of Industrial in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18;

(l) That Union acquired all of the capital stock of Sully-Miller in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

The trial court invited separate consideration by motions for summary judgment of the asphaltic concrete elements of Copp's complaint. It was stipulated that all of the substantive allegations of Copp's complaint were to be admitted for the purpose of any motion for partial summary judgment addressed to the asphaltic concrete commerce issue (13 R 306). This stipula-

tion thereby *eliminated* the following substantive questions:

> (a) Whether, in fact, there was a combination or conspiracy in restraint of, or to monopolize any part of trade or commerce among the several states in violation of Section 1 or 2 of the Sherman Act;
>
> (b) Whether, in fact, the acquisition by Union of Sully-Miller or Gulf or Industrial "may be substantially to lessen competition or tend to create a monopoly" in violation of Section 7 of the Clayton Act;
>
> (c) Whether, in fact, the alleged tie-in practices existed and whether the effect thereof "may be to substantially lessen competition or tend to create a monopoly" in violation of Section 3 of the Clayton Act;
>
> (d) Whether, in fact, the effect of the alleged discretionary pricing practices "may be substantially to lessen competition or tend to create a monopoly in any line of commerce in violation of the Robinson-Patman Act."

Preliminary jurisdictional requirements, and *only* such jurisdictional requirements, of Sections 1 and 2 of the Sherman Act, Sections 3 and 7 of the Clayton Act, and the Robinson-Patman Act amendment to the Clayton Act were to be submitted for decision by motion for summary judgment upon the express stipulation that the allegations of the complaint as to all substantive violations of each of these statutes were true.

It is undisputed that asphaltic concrete sold by Industrial and Sully-Miller is produced from refining crude petroleum, including imported crude petroleum (App.

180-181). It was also admitted that Industrial owned fifty-five hot plants including a plant in Las Vegas-Henderson, Nevada, and a plant in Phoenix, Arizona (App. 180) and that Sully-Miller owns eleven hot plants, generally in Southern California (App. 182).

It was further admitted that from 1964 to 1970, Industrial's California plants made total asphaltic concrete sales ranging from 3,900,000 tons to 5,000,000 tons per year; its asphaltic concrete sales from its Phoenix plant ranged from 5,000 tons to 277,000 tons per year, and its asphaltic concrete sales from its plant at Las Vegas-Henderson were 21,000 tons in 1969 and 91,000 tons in 1970 (App. 180-181). Sully-Miller admitted that asphaltic concrete was used for constructing, maintaining, surfacing, resurfacing, and repairing roads and highways including federal interstate system highways and highways directly connected to interstate highways (App. 181).

Finally, when discovery by deposition was commenced by Copp on the asphaltic concrete jurisdictional issues, discovery as to dollars of sales and tonnage of asphaltic concrete involved in interstate highways was eliminated upon the submitted stipulation, accepted by the trial court, that "more than a de minimis quantity of the asphaltic concrete delivered by Copp and their competitors is delivered for use on interstate highways."[4] Br. App. A 3.

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[4]This stipulation probably made it unnecessary to burden the record with statistics showing the dollar volume of asphaltic concrete produced and sold by Industrial or Sully-Miller or the dollar value of such sales for use in interstate highways.

The stipulation is in law that such sales for that purpose were substantial. Substantiality is also supported by the fact, sworn to by plaintiff and accepted by the trial court that In-

(This footnote is continued on next page)

It was also conceded that the interstate highway system and those who build it, supply it, and work on it are encompassed by and subject to the control and authority of the federal government. App. 179-180.

The trial court granted partial summary judgment to Gulf, United, Edington, and Industrial as to all of the asphaltic concrete issues in the case (leaving the remaining liquid asphalt issues to be tried) and full summary judgment in favor of Sully-Miller since, as the trial court stated, Sully-Miller was only engaged in the asphaltic concrete aspect of the business. Br. App. A. 8. It reasoned that as to the Sherman Act (a) asphaltic concrete was a locally produced product, locally applied, and (b) the alleged combination or conspiracy with respect to its use on interstate highways did not meet the Sherman Act's jurisdictional test. Br. App. A. 3-7.

The court also held, in effect, that since the Sherman Act jurisdictional test was not met, *a fortiori*, the jurisdictional requirements of Sections 3 and 7 of the Clayton Act and Section 2(a) of the Clayton Act, as amended (the Robinson-Patman Act), were not satisfied. Br. App. A. 7.

C. Proceedings in the Court of Appeals.

Copp was allowed an interlocutory appeal to the court below under Title 28, United States Code, Section 1292(b). That court reversed as to jurisdiction under all four statutes. It held that with respect to the Sherman Act it had long been established in this Court's decisions that Congress, in passing that statute, intended to exercise the full extent of its constitutional power under Article I, Section 8, Clause 3, of the Constitution. *United States v. Southeastern Underwriters Association*, 322 U.S. 533, 558-559 (1944). It further held that, as this Court's reading of Article I, Section 8 has expanded, so had its interpretation of the jurisdictional scope of the Sherman Act (402 F.2d 202, 204).

It further noted that the decisions in *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943), *Alstate Construction v. Durkin*, 345 U.S. 13 (1953), and *Mitchell v. S. W. Vollmer & Co.*, 349 U.S. 427, 429 (1955) had established that for purposes of the Fair Labor Standards Act, Title 29, United States Code, Section 201, *et seq.*, vehicular roads were instrumentalities of interstate commerce, that persons repairing them were "engaged in commerce"; that those engaged in the local production of a road surfacing mixture for local use in an interstate highway were covered; and that the test was "whether the work is so directly and vitally related to the functioning of an instrumentality of interstate commerce as to be, in practical effect, a part of it rather than isolated local activity." Adhering to the application of those principles in *City of Fort Lauderdale v. East Coast Asphalt Corp.*, 329 F.2d 871 (5th Cir.), *cert. den.* 379 U.S. 900 (1964), the court below held that if highway builders and suppliers are "in commerce" because of their close relationship with an instrumentality of interstate commerce for labor relations purposes, they are in commerce for the regulation of price fixing and monopolization particularly

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dustrial and Sully-Miller together controlled seventy-five percent (75%) of the paving business in Southern California. Br. App. A 6.

Judicially noticeable facts establish that the federal aid highway systems in 1970 included approximately 10,000 primary and 15,000 secondary miles of highways in California (App. 169); that in 1970 in excess of approximately 10,000,000 motor vehicles entered California (App. 170); that in 1972 federal aid to California was in the amount of at least $394,000,000 (App. 173).

where the allegation and proof is as to activities involving the illegal manipulation of the very costs and products which put those same businesses "in" interstate commerce for purposes of the Fair Labor Standards Act (487 F.2d 202, 205).

The court below noted that Section 3 of the Clayton Act prohibited tie-in arrangements by "any person engaged in commerce"; that for jurisdiction under the Clayton Act, Section 7, both the "acquired" and the "acquiring" companies must be "in commerce" and that Robinson-Patman Act price discrimination jurisdiction required that the sales as well as the selling company be "in commerce." The court held that the fact that these Acts were intended to supplement the purpose and effect of the Sherman Act supported a uniform interpretation of the "in commerce" requirements present in all three statutes. Since the admitted facts established that Sully-Miller and Industrial were engaged in the construction, repair, and maintenance of interstate roads and highways and used and sold asphaltic concrete for that purpose, and that Industrial's tie-in practices were in the course of that business, *a fortiori*, the jurisdictional requirements of Sections 3 and 7 of the Clayton Act were thus established.

Similarly, Industrial's discriminatory sales of asphaltic concrete for use in interstate highways were thus clearly "in commerce" for the purposes the Robinson-Patman Act.

D. The Issues Before This Court.

This Court denied the petition for the writ insofar as it sought to reverse the decision of the court below that the district court had jurisdiction to hear Copp's claims of violation of the Sherman Act alleging restraints of

trade and monopolization in the sale of asphaltic concrete for use in interstate highways.

The issues now before this Court are:

1. Whether the anti-merger prohibitions of Clayton Act, Section 7, apply to Union's acquisition of the stock of Sully-Miller, a corporation engaged in the business of constructing, repairing interstate highways and using the selling asphaltic concrete for that purpose.

2. Whether the tie-in prohibitions of Clayton Act, Section 3, apply to Industrial's sales of asphaltic concrete for use in interstate highways;

3. Whether the prohibitions of the Robinson-Patman Act against price discrimination apply to Industrial's sales of asphaltic concrete for use in interstate highways.

Summary of the Argument.

I.

A single jurisdictional chain ties together the Constitution, Article I, Section 8, Clause 3, Sections 1 and 2 of the Sherman Act, and the Clayton Act, including the amendment to Section 2(a), the Robinson-Patman Act. The definition of congressional power over commerce in the Constitution is stated as follows:

> ". . . to regulate commerce among the several states and with foreign nations. . . ." (U.S. Const., Art. I, §8, cl. 3).

The Sherman Act, enacted in 1890, states that the restraints and monopolization which are prohibited are:

> ". . . of trade or commerce among the several states and with foreign nations." (15 U.S.C. §§ 1, 2).

Section 1 of the Clayton Act, adopted in 1914, states that for the purpose of that statute commerce is defined as:

> ". . . trade or commerce among the several states and with foreign nations. . . ." (15 U.S.C. § 12).

Thus, it is indisputable that insofar as congressional *language* is concerned, the statutory definitions of commerce in the Clayton Act and in the Sherman Act are the same, and each is as broad as the Constitution.

Thus when Congress in 1914 first prohibited the acquisition of any stock of a corporation "also engaged in commerce" (15 U.S.C. § 7) and when it prohibited tie-in sales by "any person engaged in commerce, in the course of such commerce," (15 U.S.C. § 3) the commerce to which each of those substantive statutes referred was the commerce defined in Section 1 of the Clayton Act, *i.e.*, "commerce aong the several states and with foreign nations."[5]

The jurisdictional commerce requirements of the price discrimination provision in the Clayton Act prior to amendment (October 15, 1914, c. 323, § 2, 38 Stat. 730) were tied to Section 1 of the Clayton Act set forth above. The Robinson-Patman Act amendments to the price discrimination provisions of the Clayton Act in 1936 (15 U.S.C. § 13(a)) did not include any modification of Section 1 of the Clayton Act. Thus the price discrimination under the Robinson-Patman Act which is prohibited to a "person engaged in commerce in the course of such commerce" when "one or more of the sales are made in commerce" still relates

[5]The Cellar-Kefauver amendment of Section 7 of the Act in 1950 did not alter the definition of commerce. (December 29, 1950, c. 1184, 64 Stat. 1125.)

back to the original commerce definition in Clayton Act Section 1, *i.e.*, "trade or commerce among the several states and with foreign nations."

The Sherman Act, Sections 3 and 7 of the Clayton Act, and the Robinson-Patman Act have goals which are common to each other. They are the "antitrust acts" which Congress has adopted with a common purpose to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations and to maintain the freedom of commerce in the United States.

This Court has held in *United States v. Southeastern Underwriters Association*, 322 U.S. 523, 558 (1944) that in enacting the Sherman Act Congress wanted to go to the utmost extent of its constitutional power. The Congress by the scope and the detail of its highway regulations and financing, and this Court by its unequivocal decisions, has made it unmistakable that interstate roads and highways are instrumentalities of interstate commerce and that in all activities connected therewith such instrumentalities are within the regulatory powers of Congress under the Constitution. The legislative history, the purpose, and the applicable law demonstrate that the regulation of competition and prevention of monopoly in the construction of interstate highways and in the supplying of materials which become a part of those interstate highways is within the regulatory power which was exercised, and intended to be exercised, by the Sherman Act, the Clayton Act, and the Robinson-Patman Act. At least as applied to interstate highways and federal jurisdiction, the meaning of "commerce" in the Clayton Act and the Robinson-Patman Act has the same reach as the Sherman Act.

II.

Relative to the Clayton Act, Section 7, the Anti-Merger Act: The jurisdictional requirements of that statute are that the acquiring corporation and the acquired corporation each be a "corporation engaged in commerce."

There is no dispute that Union is a corporation engaged in commerce by any test. Sully-Miller, as a paving contractor constructing interstate highways and as a supplier of asphaltic concrete for use in the construction of such interstate highways, is similarly "engaged in commerce among the several states . . ." Interstate highways are "instrumentalities of interstate commerce." Those who construct them and those who supply materials which are included in such interstate roads and highways are "engaged in commerce," and are subject to congressional regulation. *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943); *Alstate Construction v. Durkin*, 345 U.S. 13 (1953).

Since the stated purpose of Congress in adopting Section 7 of the Clayton Act was to prevent acquisitions where "the effect of such acquisition *may* be substantially to lessen competition . . .," Congress patently intended the broadest constitutionally permissible application of the anti-merger statute. It would be anomalous that acquisitions in a single state, or single state by single state, of potentially anti-competitive or dominant control of the interstate highway paving contractor business or of the supply of asphaltic concrete for that use would be beyond the jurisdiction of Section 7 of the Clayton Act merely for the reason that the asphaltic concrete does not physically move from state to state.

III.

Relative to Clayton Act Section 3: This statute prohibits tie-in sales where such sales are by a seller "engaged in commerce, in the course of such commerce." The basic facts applicable to Clayton Act Section 7 are equally applicable to Section 3.

Industrial, because it sells substantial quantities of asphaltic concrete for use in the construction, maintenance, and repair of interstate highways and engages in tie-in practices in the course of that business, falls within the jurisdictional reach of the statute. The link of these practices to interstate highways forms the nexus with "commerce among the several states," the defined meaning of commerce under Clayton Act Section 1. Since Congress, in adopting prohibitions against tie-in sales, attempted to cut off Sherman Act anti-competitive restraints "in their incipiency" where the effect "*may* be to substantially lessen competition," that statute patently calls for the application of the broadest constitutional meaning of "commerce" which is a jurisdictional reach coextensive with the Sherman Act.

IV.

Relative to the Robinson-Patman Act: The jurisdictional test for discriminatory sales under the 1936 amendment to Section 2 of the Clayton Act, known as the Robinson-Patman Act (15 U.S.C. § 13(a)), requires that the seller is "engaged in commerce" and "in the course of such commerce" discriminates in price "where either or any of the purchases involved in such discrimination is in commerce." Alleged discriminatory sales by Industrial of asphaltic concrete for use in the construction, maintenance, and repair of interstate highways again provides the statutory nexus with commerce

as it is defined in Section 1 of the Clayton Act for the purpose of jurisdiction.

The 1936 Robinson-Patman Act was adopted as an amendment to the 1914 Clayton Act. It did not change the definition of commerce contained in Section 1 of the Clayton Act. While the legislative history of the 1936 Robinson-Patman Act amendment is entwined with the interstate commerce aspects of the decision of this court in *Schechter Bros. Poultry v. United States*, 295 U.S. 495 (1935) and the subsequent reversal of that decision on the commerce issue in *Wickard v. Filburn*, 317 U.S. 111 (1942) it appears that here, again, the Congress intended that the jurisdiction of courts under the Robinson-Patman Act to hear claims of discriminatory pricing "in commerce" extend to the full meaning of that constitutional concept as declared by this Court.

Moore v. Mead's Fine Bread, 348 U.S. 115 (1954) precludes the argument that the jurisdictional requirements of the Robinson-Patman Act can be satisfied *only* by a sale which moves across state lines. Congress has the clear power to protect competition with respect to the construction, repair, and maintenance of interstate highways and the supplying of materials which are included in those highways, and there is no evidence that Congress intended to exclude instrumentalities of interstate commerce from the reach of any of its statutes which protect competition. There would appear to be no reason in legislative history or policy to preclude federal courts, as a matter of jurisdiction, from considering price discrimination in the sale of asphaltic concrete for use in interstate highways.

ARGUMENT.

I.

Federal Jurisdiction Over Interstate Highways as Instrumentalities of Commerce Is Complete and Pervasive.

Congress had indicated its intent to exercise the full scope of its powers, generally with respect to the interstate highways and specifically with respect to the encouragement and regulation of competition in the construction of that system.

A central fact which supports respondents' argument as to the application of all the antitrust statutes to the case at bar is the comprehensive federal interest in the interstate highway system and the expression of congressional intent that the federal government shall encourage full and free competition in the construction of that system.

The interstate highway system and those who build it, supply it, and work on it are encompassed by and subject to the control, authority, and financing of the federal government. Thus, the federal government contributes a portion of the cost of construction of all public highways. The basis of federal participation is the Federal Aid Highway Act (23 U.S.C. §§ 101-114). Under that Act, the federal government assumes approximately 90 percent of highway construction costs. To qualify for such aid, the states are required to establish standards for vehicle weight and width limitations (23 U.S.C. § 127), control outdoor advertising (23 U.S.C. § 135), create highway safety programs (23 U.S.C. § 135), and even control junk yards (23 U.S.C. § 136). Each project is subject to the inspection and approval of the Secretary of Transportation,

and was formerly under the control of the Secretary of Commerce. All wages paid for laborers and mechanics employed by contractors and subcontractors on roads funded by the Federal Act are controlled by the Davis-Bacon Act (23 U.S.C. § 113). In order to obtain aid, the state must create a highway department satisfactory to federal authorities (23 U.S.C. § 302).

The State of California has qualified for aid under the Federal Aid Highway Act, receives funds, and consents specifically to the application of the provisions of Title 23. In 1970, federal aid to the State of California for highways was in excess of $394,000,000. App. 173.[6] In 1970 in excess of approximately ten million motor vehicles entered the State of California from outside the state. App. 170.

It is this pervasive long-standing interest in a federal interstate highway system which has lead this Court to hold that interstate highways are "instrumentalities of interstate commerce." *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943). Moreover, Congress has not been silent with respect to its interest in the promotion and protection of competition in connection with the construction of the interstate highway system. Thus, the Congress stated:

> "It is declared to be in the national interest to encourage and develop the actual and potential capacity of small business and to utilize this important segment of our economy to the fullest practicable extent in construction of the Federal-aid highway systems, including the Interstate System. In order to carry out that intent, *and encourage full and free competition*, the Secretary should assist, insofar as feasible, small business enterprises in obtaining contracts in connection with the prosecution of the highway program. Pub. L. 85-767, Aug. 27, 1958, 72 Stat. 913." (23 U.S.C. § 304).

[6]Defendant Sully-Miller and defendant Industrial must comply with Executive Order No. 11246 dated September 24, 1965, in order to perform work on county roads funded under the Federal Aid Highway Act. App. 179, 180.

This statute also states:

> "The Secretary shall require as a condition precedent to his approval of each contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, a sworn statement, executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, *participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contract.*" (23 U.S.C. § 112(c)).

In the light of this pervasive federal interest and the recognition by Congress in the Federal Aid Highway Act of the need to protect and preserve competition in the construction of highways financed by federal funds, it would be anomalous indeed if the principal statutes which have been designed to protect and preserve competition were intended to be inapplicable. An analysis of the statutory history shows that this anomaly does not exist.

Petitioners state the issue as ". . . the question in cases like this is not how far Congress could go, but how far has it gone. . . ." Pet. Br. 14. It is respectfully

submitted, the specific intent of Congress to encourage the protection of competitive practices in the construction, maintenance, and repair of the interstate highways has been given statutory expression.

II.

The District Court Clearly Had Jurisdiction of the Acquisition by Union of the Capital Stock of Sully-Miller.

Since Union imports crude petroleum and distributes the products refined therefrom, including liquid asphalt, in many states, Union is clearly a corporation "engaged in commerce." There is no dispute as to this fact. It is conceded that Sully-Miller, the acquired corporation, owns eleven hot plants, principally in Southern California, from which it manufactures asphaltic concrete and uses that product in its interstate highway construction business and sells asphaltic concrete to others for the same purpose. While asphaltic concrete must be used within a fairly short radius from each hot plant, the interstate highway construction business of Sully-Miller and the use and sale of asphaltic concrete in those activities clearly falls within the jurisdictional commerce test of Section 7.

A. By Its Express Terms, the Jurisdictional Reach of Section 7 of the Clayton Act Is the Same as Sections 1 and 2 of the Sherman Act.

Clayton Act Section 7 requires that the acquiring and the acquired corporations be corporations "engaged in commerce" and, as we have noted, the commerce definition of Section 1 of the Clayton Act is the same as Sections 1 and 2 of the Sherman Act, and each statute mirrors Article I, Section 8, Clause 3 of the Constitution. As we have noted further, this Court has recognized that in enacting the Sherman Act, Congress "wanted to go to the utmost extent of its constitutional power in restraining trust and monopoly agreements. . . ." *United States v. Southeastern Underwriters Association*, 322 U.S. 523, 558 (1944).

The court below has held expressly there was jurisdiction as to the asphaltic concrete issues of Copp's complaint under the Sherman Act, and this Court has denied certiorari as to that issue.

What was the intent of Congress in 1914 at the time it passed the Clayton Act, including the anti-merger provisions? The Senate Report stated that intent, as follows:

> "It is well, at the outset, to state the theory of the Bill both as it passed the House of Representatives and as it is proposed to be amended, for the general scope of the house measure is unchanged. It is not proposed by the Bill or amendments to alter, amend or change in any respect the original Sherman Antitrust Act of July 2, 1890. The purpose is only to supplement that Act and the other antitrust acts referred to in Section 1 of the Bill. Broadly stated, the Bill in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890 or other existing antitrust acts, and thus by making these practices illegal, to arrest the creation of trusts, conspiracies and monopolies in their incipiency and before consummation." (Senate Report No. 698, 63d Cong., 2nd Sess., 1914).

Indeed, there was an expansion of *territorial* jurisdiction of the Clayton Act over the Sherman Act as applied to insular possessions of the United States.

> "The definition of commerce, it will be observed, so as to include trade and commerce between any insular possessions or places under the jurisdiction of the United States, which at present do not come within the scope of the Sherman Anti-trust law or other laws relating to trusts." (House Report No. 627, 63d Cong., 2d Sess., p. 7).[7]

The Court of Appeals for the Third Circuit has recognized that when Congress originally enacted Section 7 of the Clayton Act in 1914 it intended that provision to have just as broad a reach as the Sherman Act. In *Transamerica v. Board of Governors*, 206 F.2d 163, 166 (3d Cir. 1953), the court said:

> ". . . The avowed purpose of the Clayton Act was to supplement the Sherman Act, 15 U.S.C.A. §§ 1-7, 15, by arresting in ther incipiency those acts and practices which might ripen into a violation of the latter act. Since the general language of the Sherman Act was designed by Congress 'to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements' the supplementary general language of the Clayton Act was undoubtedly intended to have the same all inclusive scope."

[7]The report also noted that Section 8, which became Section 7 ". . . is intended to eliminate this evil [the application of economic power through stock acquisition] so far as it is possible to do so. . . ." (*Id.* at 17).

In the petitioners' attempt to distinguish and avoid the unmistakable language of the *Transamerica* case, it is stated: "There it was sought to shrink the test of the Act from its natural coverage; here it is sought to expand it into a different kind of regulation." Pet. Br. 38. In the *Transamerica* case, it was conceded by Judge Maris in his opinion as being doubtless true that at the time of the passage of the Clayton Act in 1914 the Congress did not specifically contemplate banks as being in commerce. Nonetheless Judge Maris found that Section 7 of the Clayton Act did apply to prevent monopoly practices in the banking interest upon the rationale that the Sherman Act and the supplementary language of the Clayton Act used the fullest extent of constitutional power. Thus, although banks were not specifically intended to be covered when the Act was passed, the full use of power gave jurisdiction over the banking industry. The general intent of Congress to exercise the fullest extent of its constitutional power afforded jurisdiction over the banks although the Congress when it originally passed the Clayton Act did not have banks specifically contemplated. The implication of this rationale to the instant case is clear and unavoidable.

Petitioners argue that in *Transamerica* there was an attempt to *shrink* the Act (Clayton Act) from its natural coverage. What was the natural coverage of the Clayton Act? In the language of *Transamerica*, it was the same "all exclusive scope" as the Sherman Act, to wit, "the utmost extent of its Constitutional power in restraining trusts and monopoly agreements."

In *Brown Shoe Co. v. United States*, 370 U.S. 294, 315-323 (1962), this Court reviewed the 1950 legisla-

tive history of the amendment to Section 7 and found that "[t]he dominant theme pervading congressional consideration . . . was a fear of what was considered to be a rising tide of economic concentration in the American economy." (*Id.* at 315). In addition, the legislative history reflected congressional concern over the "desirability of retaining 'local control' over industry and the protection of small business." (*Id.* at 315-316). Motivated by its concern over increasing concentration, Congress sought to give ". . . courts the power to brake this force at its outset and before it gathered momentum." (*Id.* at 317-318).

Certainly, no one can doubt that the deliberate acquisition of one hundred percent of the market for manufacturing and supplying asphaltic concrete, and control of interstate highway asphalt contractors in California, a result which patently could lead to monopoly prices in the construction and repair of interstate highways and the supplying of asphaltic concrete in connection therewith, would be a violation of Section 2 of the Sherman Act.

It would be a ludicrous defense to a Sherman Act proceeding, on those facts, to assert that asphaltic concrete does not move between states and therefore monopoly power over these interstate activities is not within the Sherman Act. That would be a mechanistic analysis of commerce and not the practical analysis which this Court has always required. *Overstreet v. North Shore Corp.*, 318 U.S. 125, 128 (1944).

If the acquisition of one hundred percent of the asphaltic concrete business in California would violate Section 2 of the Sherman Act, it is equally obvious that acquisitions which may lead to that result are precisely the intended object of Clayton Act Section 7.[8]

Petitioners have referred to and argued at length the appeal in *United States of America v. American Building Maintenance Industry*, No. 73-1689. In that case, involving the merger of maintenance companies which perform services for corporations engaged in interstate commerce, the United States argues that "engaged in commerce under Section 7 means engaged in activities in commerce or affecting commerce." We agree with this concept, although it is not necessary for the purposes of a decision of this case.

When Congress uses the term "commerce," and defines it in statutory language which mirrors the Constitution, that statutory language must be as broad as the Constitution. It would be facetious to deny that it is not aware of the fact that this Court's practical interpretation of "commerce" has changed and is changeable. "Commerce among the several states" means, constitutionally, activities in commerce or which affect commerce. (See the Shreveport Rate Cases, 234 U.S. 342 (1914).) The reach of Clayton Act Section 7 must embrace that meaning.

But in the instant case the construction of interstate highways and supplying of asphaltic concrete which

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[8]The distinction is not between "macroscopic and microscopic acquisitions". Pet. Br. 31. Interstate highways are instrumentalities of interstate commerce and *any* acquisition of a corporation that constructs interstate highways or supplies material which goes into such highways is so closely related to such instrumentalities as to be embraced by the jurisdictional test of "commerce" within the meaning of the antitrust laws.

becomes a part of those highways are each activities "in commerce" and the "affect" cases are not necessary to the decision here.[9]

Finally, petitioners argue the doctrine of federalism as a defense to the application of Clayton Act Section 7 to the acquisition of Sully-Miller. Who has the greater interest in the prevention of monopoly in the construction of interstate highways? Conceding a substantial state interest, can it be fairly stated that the federal interest is insubstantial? The fact that California has no anti-merger statute is a stronger, not weaker, argument in favor of the availability of the broadest possible protection of Section 7.

III.

Section 3 of the Clayton Act Was Applicable to the Tie-In Practices of Industrial.

The argument and authorities applicable to Section 7 of the Clayton Act are equally applicable to Section 3 of the Clayton Act. Industrial was also a corporation engaged in the business of manufacturing asphaltic concrete, using that product as part of its business to construct and repair interstate highways and, in addition, selling asphaltic concrete for the same purpose. Copp's allegation that tie-in practices were carried out in connection with Industrial's sales of asphaltic concrete are accepted as true for the purpose of this proceeding.

[9]Petitioners argue that if in 1914 Congress intended Clayton Act Section 7 to include corporations whose activities affected commerce, Congress could have included that phrase. But in 1914 this Court had not yet adopted the "affect" doctrine even as respects the Sherman Act. The failure of Congress to change the constitutional definition of commerce in the Clayton Act in 1950 when the Cellar-Kefauver amendment was adopted is evidence that Congress recognized that this constitutional definition would encompass this Court's expanding doctrine without any necessity for express supplementation.

The contention argued by petitioners is that the sale of asphaltic concrete for use in the construction and repair of interstate highways is not covered by the "commerce" definition of Section 1 of the Clayton Act. Since asphaltic concrete is a product which becomes a part of the interstate highway itself, the sale of that product for that purpose is, we submit, "commerce among the several states," upon the basis of the argument made earlier in this brief.

In *Alstate Construction v. Durkin*, 343 U.S. 13 (1953) this Court held that the production of amesite, which is the equivalent of asphaltic concrete, for use in interstate highways was "production of goods for commerce," and thus within the jurisdictional coverage of the Fair Labor Standards Act. By what reasoning can it be supposed that Congress intended that those employees who produce amesite or asphaltic concrete are subject to minimum wage protection but that sellers of that product who use tie-in practices to injure or eliminate competition are not covered by Section 1 and Section 3 of the Clayton Act?

As heretofore noted, congressional concern with the protection of competition as respects interstate highways in expressly stated (23 U.S.C. § 304). Certainly tie-in practices have been condemned by this Court as practices which have no other purpose other than the limitation of competition. *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958).

Thus, if the purpose of the Sherman Act is to prevent and punish elimination of competition, and the admitted purpose of the Clayton Act is to prevent these results "in their incipiency," the fundamental remedial purpose of the Clayton Act requires that the jurisdic-

tional commerce provisions be construed as broadly as the Sherman Act.

In *Standard Oil Co. & Standard Stations, Inc. v. United States*, 337 U.S. 293 (1949), the United States charged that defendant, a California corporation, coerced its customers, automobile service stations, into accepting requirements contracts. The Court rejected the argument by the defendant that its deals with California service stations were beyond the reach of Section 3 since such dealings were intrastate, saying:

> "Appellant contends that its requirements contracts with California dealers, because nearly all the products sold to them are produced in California, do not substantially affect interstate commerce and therefore should have been exempted from the decree. . . . But the effect of appellant's requirements contracts with California retail dealers is to prevent them from dealing with suppliers from outside the State as well as within the State and is thus to lessen competition in both interstate and intrastate commerce. Appellant has not suggested that if these dealers were not bound by their contracts with it that they would continue to purchase only products originating within the State." 337 U.S. 293 (1949).

It should be noted that the basis upon which the Court found jurisdiction in *Standard Oil Co. & Standard Stations, Inc.* was that the intrastate sales in California by an interstate seller would *affect* the flow of interstate commerce into California. The significance of this holding is that it establishes, beyond doubt, that the term "commerce" in the Clayton Act embraces activities both in and affecting commerce and therefore has the same jurisdictional reach as the Sherman Act.

In the instant case, respondents submit that the sale of asphaltic concrete for use in interstate highways is "in commerce" and therefore embraced by Section 3 of the Clayton Act without consideration of the "affect on commerce" doctrine. Monopoly power over the market for the supply of asphaltic concrete for interstate highways show a clear threat that, when that monopoly power is attained, the prices of asphaltic concrete for interstate highways will be increased. An obvious result would be an increase in the cost of the construction of highways in California and it is not unlikely that this would decrease the number of miles of roads constructed in California.

Here, again, Congress adopted an incipiency statute, *i.e.*, to prevent a practice, tie-ins, which, if effective, would have the ultimate result of eliminating competition. It has been noted that there was no issue in the trial court on the non-jurisdictional question as to the affect, *in fact*, of the alleged tie-in practices. The only permissible question for purposes of jurisdiction is whether, if the "affect" doctrine is applicable, tie-in practices *might* affect the cost of interstate highways. That fact, *i.e.*, that it *might* affect the cost, was conceded. Br. App. A. 6.

Petitioner, anticipating respondents' reference to *Standard Oil Co. & Standard Stations, Inc., supra*, do not seriously dispute the fact that the decision stands for the proposition that the commerce test for a Section 3 violation is met by practices in commercial activities which may "affect" interstate commerce. They argue only that no such affect is possible here because interstate asphaltic concrete sales are not shown. This argument misses the point.

Monopolization—or tie-in practices by a substantial supplier of asphalt that could lead to such monopolization—may substantially affect the price for the construction of interstate highways. Thus, *Standard Oil Co. & Standard Stations, Inc. v. United States, supra,* is clear authority for the application of Section 3 of the Clayton Act to the instant case.

IV.

The Alleged Discriminatory Sales of Asphaltic Concrete by Industrial Were "in Commerce."

The Court is not asked to pass on the merits of respondents' contentions as to price discrimination or the affect of such alleged price discrimination. What is submitted is whether a federal court had the jurisdiction to decide whether price discriminations by a seller of asphaltic concrete for use in interstate highways could, by those discriminatory sales, violate the Robinson-Patman Act.

The Robinson-Patman Act requires a showing that the seller is engaged in commerce and in the course of such commerce makes discriminatory sales and that one of these sales is in commerce. On its face, a sale of asphaltic concrete for use in the construction of interstate highways would appear to be in commerce because the sale of the product relates directly to an instrumentality of interstate commerce.

But the argument is made that, particularly in Robinson-Patman Act cases, there must be at least one sale which moves across state lines.

The history of the anti-price discrimination statute is easily stated. Section 2 of the Clayton Act was adopted in 1914 and the reference to commerce there-

in was defined in Section 1 of the Clayton Act (15 U.S.C. § 12), *i.e.,* the constitutional definition. In 1936, Congress substantially amended Clayton Act Section 2 (15 U.S.C. § 13(a)). But the Robinson-Patman Act was an amendment—not a new statute. The definition of "commerce" in Section 1 of the Clayton Act, therefore, was untouched and is therefore the definition applicable to "commerce" in the Robinson-Patman Act.

It is also accepted that the Robinson-Patman Act amendment was intended to expand the application of the provisions against discrimination. Thus it was made clear by the Robinson-Patman Act amendment that if either the discriminatory sale or the sale to the plaintiff was in commerce, that satisfied the requirements of the statute and the earlier case law requirement that both sales be in commerce was eliminated. (Senate Report 1502, 74th Congress, 2nd Sess., 1936, p. 4.)

This amendment is not directly relevant to the instant case since, respondents submit, that *all* sales of asphaltic concrete for use in construction and repair of interstate highways are sales in commerce. But petitioners assert that Robinson-Patman Act decisions require explicitly that no sale is in commerce unless it crosses state lines. Thus, petitioners argue, there is no jurisdiction in a Robinson-Patman Act case unless one of the sales goes from state to state. That general rule is, of course, patently wrong.

In *Moore v. Mead's Fine Bread,* 348 U.S. 115 (1954), this Court, in an opinion written by Mr. Justice Douglas, reinstated a jury verdict in favor of a local baker who asserted that his competitor used profits

earned by sales at higher prices in another state to underwrite losses in competition against the plaintiff in the local state, that the use of funds generated by keeping bread prices high in one state while the local prices are lowered was prohibited by the Robinson-Patman Act.[10]

The lower courts appear to be uncertain in their understanding of *Moore v. Mead's Fine Bread, supra.*[11] In the cases cited in the petitioners' brief, pages 17-18 the so-called state line test has been reiterated. Not one of these cases involves the sale of a commodity for use in interstate highways and, therefore, they provide no direct authority for the application of the Robinson-Patman Act to the facts in this case.

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[10]The fact recited in the opinion, that some sales were made across state lines, was not the basis for the Court's decision.

[11]*Willard Dairy Corp. v. National Dairy Products Corp., cert. den.* 373 U.S. 934 (1963). There, Mr. Justice Black said:

> "Moreover, I think the result below is irreconcilable with this Court's decision in Moore v Mead's Fine Bread Co. 348 US 115, 99 L ed 145, 75 S Ct 148 (1954), in which we said that the Robinson-Patman Act condemns the monopolistic practice under which profits made in non-discriminatory interstate transactions are used to offset losses arising from discriminatory price-cutting at the local level. I believe that the Court of Appeals in the present case misconstrued both the statute and Moore when it held that respondent's interstate shipments 'from other than its Shelby, Ohio, plant' were wholly 'immaterial' to this case. Refusing to grant certiorari here means that this Court is allowing the economic resources and staying power of an interstate company to be used with impunity to destroy local competition, precisely the sort of thing the Robinson-Patman Act aimed to prevent. The present case presents an important question of price cutting by interstate business with local plants, each of which services largely a local area but all of which draw on the economic power of the national operation. Judgments like the one left standing here make it difficult indeed for small, independent, local companies to survive against the predatory assaults of their larger and more powerful interstate competitors. I would grant certiorari."

Here, the asphaltic concrete may not move from state to state, but the highways of which it is a part run throughout the United States.

Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23 (1824) provides ample authority that highways that run from state to state, like navigable rivers, are instrumentalities of interstate commerce. The sale of commodities which become part of those highways are therefore sales "in commerce."

V.

The True Intent of Congress in Adopting the Robinson-Patman Act, as Shown by Its Use of Language Drawn From the Constitution, Was to Exercise All of the Constitutional Power of Congress Which It Believed It Possessed. The Jurisdictional Test of the Robinson-Patman Act, Like the Jurisdictional Test of the Sherman Act and the Clayton Act, Broadens as This Court Broadens the Meaning of "Commerce."

An examination of the legislative history of the Robinson-Patman Act demonstrates two simple but obvious facts. They are:

1. The precise jurisdictional language was still drawn from the Constitution. The seller was required to be "engaged in commerce, in the course of such commerce," and discrimination in price was condemned only "where either of the purchases involved in such discrimination are in commerce." The term "commerce" was not defined again by Robinson-Patman because that statute was adopted as an amendment to the Clayton Act. The Clayton Act definition was that "commerce" meant "trade or commerce among the several states and with foreign nations . . . ."

2. The provision of Robinson-Patman that *at least* one of the discriminatory sales was required to be in commerce was not a limiting change but an expanding change. There had been prior decisions that, under old Section 2 of the Clayton Act, *both* of the discriminatory sales were required to be in commerce. (Senate Report No. 1502, 74th Congress, 2nd Session, page 4.)

It appears, however, that the Congressional view as to the scope and the meaning of "commerce" in 1936 was substantially colored by this Court's 1935 decision in *Schechter Bros. Poultry v. United States,* 295 U.S. 495 (1935). In that case, this Court held, as one of the grounds for its decision, that the National Industrial Recovery Act could not constitutionally cover the local sale of poultry even though ninety-five percent of that poultry came from outside the state. Such relationship was deemed to show an "indirect affect" only, and *Schechter* held that such "indirect affects" did not fall, constitutionally, within congressional power.

The *Schechter* case was decided only two weeks before Representative Patman introduced his original bill, and it made the language of that bill unconstitutional. There was congressional doubt about constitutionality of the provision, not a desire that the Robinson-Patman Act's commerce requirement be narrowly construed, that led to the elimination of the provision (See HR Report 2951, 74th Congress, 2nd Session (1936)).

Indeed, in the course of the revision of certain language which would have had an expanding effect on

jurisdiction, Congressman Utterbach stated: "This was omitted as the preceding language already covers all discriminations, both interstate and intrastate, that lie within the limits of federal authority." H.R. Report 2951, 74th Congress, 2nd Session (1936).[12]

But it is old teaching that this Court has, by its decisions, changed or expanded the meaning of the power of Congress, under the Constitution, over commerce.[13] Where Congress adopts a statute which employs that constitutional phrase as the jurisdictional test, it must contemplate that as the meaning of "commerce" is expanded the application of the statute may expand.

Two classic examples are the Sherman Act and the Clayton Act.

In *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219 (1949), Justice Rutledge reviewed in detail the history of the expansion in the application of the Sherman Act. Production or manufac-

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[13]Petitioners' brief makes no reference whatsoever to congressional history. The cases upon which they rely are similarly deficient in this respect. Reference is sometimes made to the remarks by Representative Mapes, that the Robinson-Patman Act would not apply to the sales of retail merchants, but this language must be understood in the light of the impact of *Schechter*. It does not denegrate from the use of constitutional language as the jurisdictional test nor the declared intent to exercise the full power of Congress.

[12]1. See the *Shreveport Cases,* 234 U.S. 342 (1914);

2. *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219 (1948);

3. *United States v. Southeastern Underwriters Ass'n.,* 322 U.S. 533, 546 (1944);

4. *Wickard v. Filburn,* 317 U.S. 111, 119 (1942);

5. *Heart of Atlanta Motel v. United States,* 379 U.S. 258 (1964).

turing in a single state was first excluded, and then included. Interstate distributing was first excluded then included within the Sherman Act coverage.

The doctrine of "indirect," "incidental" affects was first a limitation, and then the limitation was removed The Sherman Act stayed the same, the commerce language stayed the same, but the meaning of the word "commerce" in the Sherman Act was expanded.[14]

[14]"It is true that the first decision under the Sherman Act applied those mechanical distinctions with substantially nullifying effects for coverage both of the power and of the Act. [Citation.] Like this one, that case involved the refining and interstate distribution of sugar. But because the refining was done wholly within a single state, the case was held to be one involving 'primarily' only 'production' or 'manufacturing,' although the vast part of the sugar produced was sold and shipped interstate, and this was the main end of the enterprise. The interstate distributing phase, however, was regarded as being only 'incidentally,' 'indirectly,' or 'remotely' involved; and to be 'incidental,' 'indirect,' or 'remote' was to be, under the prevailing climate, beyond Congress' power to regulate, and hence outside the scope of the Sherman Act. See Wickard v. Filburn, supra (317 U.S. at 119 et seq., 87 L ed 131, 63 S Ct 82).

"The Knight decision made the statute a dead letter for more than a decade and, had its full force remained unmodified, the Act today would be a weak instrument, as would also the power of Congress, to reach evils in all the vast operations of our gigantic national industrial system antecedent to interstate sale and transportation of manufactured products. Indeed, it and succeeding decisions, embracing the same artificially drawn lines, produced a series of consequences for the exercise of national power over industry conducted on a national scale which the evolving nature of our industrialism foredoomed to reversal.

"We do not stop to review again in detail the familiar story of the progression of decision to that end, perhaps not told elsewhere more succinctly or pertinently than in Wickard v. Filburn, supra. Suffice it to say that after coming back to life again in the Northern Securities Case, 193 US 197, 48 L ed 679, 24 S Ct 436, for matters of transportation, the Sherman Act had a second rebirth in 1911 with the decisions in Standard Oil Co. v. United States, 221 U.S. 1, 55 L ed 619, 31 S Ct 502, er LRA NS 834, Ann Cas 1912D 734, and United States v. American Tobacco Co. 221 US 106, 55 L ed 663, 31 S Ct 632. Cf. United States v. South-Eastern Underwriters Asso. 322 US 533, 553 et seq, 88 L ed 1440, 1457, 64 S Ct 1162.

"Not thereafter could it be foretold with assurance that application of the labels of 'production' and 'manufacture,' 'incidental' and 'indirect,' would throw protective covering over those processes against the Act's consequences. Very soon also came the Shreveport Rate Cases, 234 US 342, 58 L ed 1341, 34 S Ct 833, again in the field of transportation, but inevitably to add force and scope to the Standard Oil and American Tobacco rulings that manufacturing companies lay within the reach of the power and of the statute, deriving no immunity for their conduct violative of the prohibitions merely from the fact of engaging in that character of activity.

"With extension of the Shreveport influence to general application, it was necessary no longer to search for some sharp point or line where interstate commerce ends and intrastate commerce begins, in order to decide whether Congress' commands were effective. For the essence of the affectation doctrine was that the exact location of this line made no difference, if the forbidden effects flowed across it to the injury of interstate commerce or to the hindrance or defeat of congressional policy regarding it.

"The formulation of the Shreveport doctrine was a great turning point in the construction of the commerce clause, comparable in this respect to the landmark of Cooley v. Port Wardens, 12 How (US) 299, 13 L ed 996. For, while the latter gave play for state power to work in the field of commerce, the former broke bonds confining Congress' power and made it an effective instrument for fulfilling its purpose. The Shreveport doctrine cut Congress loose from the haltering labels of 'production' and 'manufacturing' and gave it rein to reach those processes when they were used to defy its purposes regarding interstate trade and commerce. In doing so the decision substituted judgment as to practical impeding effects upon that commerce for rubrics concerning its boundaries as the basic criterion of effective congressional action." *Mandeville Is. Farms v. American C.S. Co.*, 334 U.S. 219, 229-233, 92 L.Ed. 1328, 1336-1338 (1948).

As we have noted, the "commerce" language of the Clayton Act was construed to cover banking, based upon contemporary decisions that banking was indeed commerce even though there was contrary teaching in 1914 when the Clayton Act was adopted (See *Transamerica v. Board of Governors*, 206 F.2d 163 and pp. 28 to 29, *supra*).

It is submitted that the Robinson-Patman Act must be construed to encompass the expanded interpretation of "commerce" which this court has given to the Sherman Act and the Clayton Act not only because Robinson-Patman is an amendment to the Clayton Act which adopts the Clayton Act definition of commerce, and not only because enforcement of Robinson-Patman in a jurisdictional sense should be equivalent with enforcement of the Clayton Act and the Sherman Act. The principal fact is that Congress, in adopting the constitutional test for jurisdiction in Robinson-Patman, intended the full application of its constitutional power, and there is no justification in history or logic to restrict the jurisdiction of the Federal Courts in applying that remedial statute to the commerce of the United States.

Conclusion.

The decision of the court below should be affirmed.

Respectfully submitted,

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APPENDIX A.

Order.

Original Filed May 31, 1972, Clerk, U.S. Dist. Court, San Francisco.

United States District Court, Northern District of California, Master File, No. 50173-RES, No. C-71-608-RES.

In Re Coordinated Pretrial Proceedings In Western Liquid Asphalt Cases.

This Document Relates to: Copp Paving Company, Inc., et al., Plaintiffs, v. Gulf Oil Corporation, et al., Defendants.

This is one of the Western Liquid Asphalt cases.[1] Plaintiffs seek damages and injunctive relief for anti-trust law violations alleged to have been committed by the defendants in the sale and marketing of liquid asphalt and asphaltic concrete. The complaint alleges in a first claim:

1. Price fixing and a monopoly in the sale and marketing of liquid asphalt and asphaltic concrete. 15 U.S.C. §§ 1 and 2.

2. Discrimination against plaintiffs by reason of price and credit concessions to some customers and sales to plaintiffs' competitors at unreasonably low prices. 15 U.S.C. § 13(a).

3. Unlawful exaction from customers of agreements not to use or deal in plaintiffs' products and services. 15 U.S.C. § 14.

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[1]Pursuant to 28 U.S.C. § 1407 the cases were transferred to the United States District Court for the Northern District of California for coordinated or consolidated pretrial proceedings. *See In re Western Liquid Asphalt*, 303 F.Supp. 1053 (J.P.M.L. 1969); *In re Western Liquid Asphalt*, 309 F.Supp. 157 (J.P.M.L. 1970).

4. Acquisition of stock, lessening competition and tending to create a monopoly. 15 U.S.C. § 18.

The second claim is substantially similar to the first except that it charges the violations under the California Cartwright Act (California Business and Professions Code § 16720).

Defendants by a series of motions seek to eliminate from this case the issues which are not common to the remainder of the Western Liquid Asphalt litigation. The court has heretofore stayed the discovery particular to this case and has ordered discovery to disclose the court's subject matter jurisdiction as to the asphaltic concrete issues.

I have assumed for the purposes of this order that the plaintiffs have proved all that they could as to the interstate character of their claim. In December 1971 it appeared to the court that there were potential jurisdictional problems which should be decided prior to the large-scale discovery on the merits which the plaintiffs proposed. The court ordered that discovery be directed to the jurisdictional problems, and plaintiffs made no request to enlarge the time allowed for that discovery. While in this day of notice pleadings and liberal discovery a plaintiff may initiate a case with no more than hope that his discovery will unearth something, I have acted on the premise that before parties should be required to submit to a burdensome discovery on the merits the facts supporting the jurisdiction of the court should be disclosed.

Liquid asphalt is a by-product of the refining of petroleum. It is extensively used in connection with the

construction and repairing of road and highway and other surfaces. Liquid asphalt does move in interstate commerce.

Asphaltic concrete is made by combining aggregates, fillers, and hot liquid asphalt in a hot plant operated at temperatures of approximately 375°F. The asphaltic concrete is discharged into a dump truck and delivered to the job, where it is placed at a temperature of about 275°F.

The traffic in asphaltic concrete is essentially local. The requirement that it be delivered hot plus the high costs of transportation as compared to the value of the product require that a hot plant serve a relatively restricted area. In this case plaintiffs' business was confined to an area near Los Angeles with a radius of 30 to 35 miles. None of the plants in competition with the plaintiffs delivered out of California. A more than de minimis quantity of the asphaltic concrete delivered by plaintiffs and their competitors is delivered for use on interstate highways.

While liquid asphalt moves in interstate commerce, the liquid asphalt used by plaintiffs and their competitors all comes from the State of California, which is an exporter of liquid asphalt. The aggregate used likewise are produced in California. The jurisdictional problem arises out of the fact that plaintiffs and plaintiffs' competitors manufacture a product out of California raw materials for sale and delivery in California.

The jurisdictional problem must be solved by examining the facts under the "in commerce" and the "affecting commerce" theories. *Yellow Cab Company of Nevada v. C. A. Christmas, et al.*, No. 25,567 (9th Cir. Mar. 1, 1972).

As indicated, asphaltic concrete does not move in interstate commerce except under exceptional circumstances, none of which are present here. Hence none of the acts charged to the defendants affect in any way the interstate movement of asphaltic concrete. Plaintiffs contend, however, that the use of the asphaltic concrete in the interstate highways puts it "in commerce" within the meaning of the Sherman Act. Plaintiffs point to the authorizing language in the Federal-Aid Highway Act (23 U.S.C. § 101(b)) which expressly relates the interstate highways to interstate commerce, to 23 U.S.C. § 113, which expressly subjects interstate projects to the terms of the Davis-Bacon Act (40 U.S.C.A. §§ 276(a) *et seq.*), to *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943) holding that vehicular roads are instrumentalities of interstate commerce and that persons repairing them are "engaged in commerce" within the scope of the Fair Labor Standards Act (29 U.S.C. §§ 201 *et seq.*), and to *Alstate Construction Co. v. Durkin*, 345 U.S. 13 (1953), holding that persons locally employed producing amesite for local use in an interstate highway are engaged in the "production of goods for commerce" and for that reason are protected by Section 7(a) of the Fair Labor Standards Act (29 U.S.C.A. § 207(a)). The conclusion which plaintiffs draw from these authorities is that since interstate highways are in commerce parties supplying materials for the repair and construction of them are likewise in commerce and that there is jurisdiction under the Sherman Act.

Word meanings found in one legally regulated area may[2] or may not[3] be useful in determining the word

[2]*Overstreet v. North Shore Corp., supra.*

[3]*Trade Comm'n v. Bunte Bros., Inc.*, 312 U.S. 349 (1941).

meanings to be used in another. The Sherman Act forbids conspiracies "in restraint of trade or commerce among the several States." 15 U.S.C. § 1. In providing guidelines for the interpretation of the Act courts have used the terms "in commerce" and "affecting commerce."

Both the language[4] of the decisions under the Sherman Act and the results reached by them indicate that the words "in commerce" are used in connection with local acts which do in fact affect in any degree the flow of interstate commerce. Thus in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the defendant's acts were designed to shut down a radio station doing an interstate business. In *United States v. Bensinger Company*, 430 F.2d 584 (8th Cir. 1970), the defendant conspired to fix the price of a single dishwasher which was itself in interstate commerce. In *Las Vegas Merchant Plumbers Ass'n v. United States, supra*, the evidence showed that as a result of the alleged conspiracy plumbers refused to work for a foreign plumber using imported fixtures.

On the other hand if the local act, though done in a business which is in interstate commerce, does not affect the flow of such commerce, then the "in commerce" theory is not satisfied. Thus in *Yellow Cab Company of Nevada v. C. A. Christmas, supra*, the court quoted with approval from *Page v. Work, supra*, as follows:

> The record is clear that appellee newspapers and Consolidated were engaged in interstate com-

[4]*Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732 (9th Cir. 1954), *cert. denied*, 348 U.S. 817 (1954), *rehearing denied*, 348 U.S. 889 (1954); *Page v. Work*, 290 F. 2d 323 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961); and *Yellow Cab Co. of Nevada v. C. A. Christmas, supra.*

merce by virtue of (1) their regular purchases of newsprint and other supplies from sources outside of California; (2) the dissemination of national news; (3) their carrying of national advertising; and (4) a few out-of-state subscribers.[5]

Yet, since the conspiracy related solely to local advertising, the court held that the defendant's activities did not affect the flow of commerce. I conclude that the plaintiffs' position cannot be maintained on the "in commerce" theory.

The question—Did the defendants' local activities substantially affect commerce?—remains.

Plaintiff Ernest Copp's affidavit is to the effect that Sully-Miller Contracting Company (Sully-Miller), a subsidiary of Union Oil Company of California (Union), and Industrial Asphalt, Inc., a subsidiary of Gulf Oil Corporation, together control 75% of the paving business in Southern California. It is claimed, and for the purposes of this order it is assumed, that Sully-Miller and Industrial Asphalt, Inc. are given preferential prices for liquid asphalt by their parent corporations which produce asphalt and that it is as a result of this competitive advantage that they have injured plaintiffs and gained for themselves a substantial corner on the paving market in Southern California.

Defendants' dealings in asphaltic concrete bear two possible relationships to restraints of interstate commerce. It is conceivable that a monopoly with respect

[5]It is noted that these activities are sufficient to put a newspaper in interstate commerce for the purpose of the National Labor Relations Act (*Associated Press v. N.L.R.B.*, 301 U.S. 103 (1937)), and the Fair Labor Standards Act (*Sun Publishing Co. v. Walling*, 140 F.2d 445 (6th Cir. 1944), and *McComb v. Dessau*, 89 F.Supp. 295 (S.D. Cal. 1950)).

to a product used in interstate highways could so increase the price of the product and the subsequent cost of the highways that fewer and poorer highways would be constructed and that interstate commerce could thus be affected. There is no evidence which gives any substance to this possibility. *Cf. Uniform Oil Co. v. Phillips Petroleum Co.*, 400 F.2d 267 (9th Cir. 1968).

As indicated, liquid asphalt does move in interstate commerce although the asphalt used by plaintiffs and defendants here was produced in California. It is possible as in *Las Vegas Merchant Plumbers Ass'n v. United States, supra*, that the agreement to divide an intrastate market for products moving in interstate commerce can affect commerce. It is sufficient here to say that plaintiffs do not suggest a theory (much less support it) by which a division of an intrastate market for asphaltic concrete produced from local liquid asphalt could affect the interstate market in liquid asphalt.

I conclude that the local activities of the defendants with regard to asphaltic concrete did not have a substantial impact on interstate commerce.

I conclude that the court should not, if it could, accept jurisdiction of the disputes as to the asphaltic concrete under the California law as pendent to the court's jurisdiction of the liquid asphalt claims. The issues differ not only because of the difference in the product involved but because of the difference in the nature of the cases. The case as to liquid asphalt is an action by a consumer seeking to recover damages caused by an alleged conspiracy to fix prices. To the extent that plaintiffs seek that relief their case remains. The issues raised as to the various methods of unfair competition practiced by the defendants in connection

with asphaltic concrete are not common to the liquid asphalt claims—they require a consideration of different facts and different laws. It is not in the interest of the expeditious treatment of these cases to add any extraneous issues to the massive and complex liquid asphalt litigation.

The defendant Sully-Miller neither produces nor markets liquid asphalt and does no interstate business of any kind.

IT IS THEREFORE ORDERED:

1. As to defendant Sully-Miller Contracting Company:

That there being no issue of material fact as to the defendant Sully-Miller Contracting Company its motion for summary judgment should be and is hereby granted and the plaintiffs are denied all relief.

2. As to the remaining defendants:

All discovery and further proceedings herein shall be limited to the following issues: (a) With respect to liquid asphalt whether said defendants, or any of them, violated 15 U.S.C. §§ 1, 2, 3, 13(a), 14 or 18, and if so (b) Whether and to what extent, if any, plaintiffs or any of them were injured in their businesses or properties by reason of said violations, if any.

3. No discovery or further proceedings shall be had herein with respect to any of the remaining claims herein asserted, *viz.*:

(a) Any claims that defendants, or any of them, violated 15 U.S.C. §§ 1 or 2 in connection with the marketing of asphaltic concrete;

(b) Any claims that defendants, or any of them, violated 15 U.S.C. § 13(a) in connection with the marketing of asphaltic concrete;

(c) Any claims that defendants, or any of them, violated 15 U.S.C. § 14, in connection with the marketing of asphaltic concrete;

(d) The claim that defendant Union Oil Company of California violated 15 U.S.C. § 18 by acquiring all the capital stock of defendant Sully-Miller Contracting Company;

(e) Any claims that defendants, or any of them, violated Section 16720 of the California Business and Professions Code with respect to asphaltic concrete.

I am of the opinion that the orders made herein and each of them involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from these orders may materially advance the ultimate termination of the litigation.

DATED this 29th day of May, 1972.

/s/ RUSSELL E. SMITH
United States District Judge

Service of the within and receipt of a copy thereof is hereby admitted this.....day of August, A.D. 1974.

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